

No. 10228

United States
Circuit Court of Appeals
For the Ninth Circuit. *12*

— *2327*
WASHMONT CORPORATION, a Corporation,
Appellant,
vs.

THOR W. HENRICKSEN, Individually, and as
Acting Collector of Internal Revenue for the
Western District of Washington, Southern
Division,
Appellee.


—
Transcript of Record
—

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Southern Division

FILED

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PAUL P. O'BRIEN,



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorneys for Defendant-Appellee.

In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 216

WASHMONT CORPORATION, a corporation,
Plaintiff,

vs.

THOR W. HENRICKSEN, individually and as
Acting Collector of Internal Revenue for the
Western District of Washington, Southern
Division,
Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action
against the defendant herein alleges as follows:

I.

That the defendant herein is and ever since prior
to the 8th day of July, 1940, has been the Acting
Collector of Internal Revenue for the Collection
District of Washington, having his office and resid-
ing at the City of Tacoma within the jurisdiction
of this court; that the acts done by the defendant as
herein alleged were done by him in his representa-
tive capacity and under and pursuant to the direc-
tions of the Commissioner of Internal Revenue of
the United States.

II.

That the plaintiff is and at all times herein men-

tion was a corporation organized and existing under the laws of the State of Washington and having its principal place of business at the City of Seattle, King County therein, and making its returns under the Federal income and excess-profits acts to the Collector of Internal Revenue at Tacoma, Washington; that the plaintiff has at all times borne true faith and allegiance to the government of the United States and has not in any way aided, abetted or given [1*] encouragement or comfort to any person, persons or government in rebellion against the United States, nor has it aided, abetted or given encouragement to any sovereign or government which has been or is at war with the United States.

III.

That pursuant to the requirements of the Federal income and excess-profits tax laws (now Internal Revenue Code) then in force and effect, the plaintiff duly filed its income tax returns with the defendant for the taxable years 1937 and 1938 as an ordinary corporation, and within due time paid to the defendant all tax liability arising thereunder.

IV.

That thereafter the Commissioner of Internal Revenue caused an audit to be made of said returns as a result of which he held and determined that during each of said years the plaintiff constituted a personal holding company and was subject to tax as such under and pursuant to provisions of Section

*Page numbering appearing at foot of page of original certified Transcript of Record.

351 of the Revenue Act of 1936, as amended by the Revenue Act of 1937 and Section 401 of the Revenue Act of 1938, the provisions of which acts, with reference to the matter here in controversy, are substantially identical. The Commissioner of Internal Revenue further held that the plaintiff was required to file and was delinquent by reason of not filing a return as a personal holding company on Form 1120-H for each of said years. Thereupon and by reason of such holding and determination the Commissioner of Internal Revenue held that this plaintiff was subject to assessment for and he did thereupon determine and assess a deficiency in income taxes under the personal holding company sections of the applicable revenue acts in the sum of \$2,759.71, together with a penalty for failure to file a personal holding company return of \$685.55, making a total of \$3,445.26 for the year 1937 and of [2] \$2,097.16, together with a penalty for failure to file a personal holding company return of \$582.88, making a total of \$2,680.04 for the year 1938.

V.

That thereafter and pursuant to such determination of the Commissioner of Internal Revenue and on or about July 8, 1940, the plaintiff paid to the defendant, as Acting Collector of Internal Revenue for the Collection District of Tacoma, the sum of \$6,815.32, being the amount of said deficiencies and interest thereon as above set forth, together with interest applicable to the deficiency for 1937

amounting to \$478.56 and for the year 1938 amounting to \$211.46.

That thereafter and on or about July 19, 1940, plaintiff filed with the defendant, as Acting Collector of Internal Revenue for the Collection District of Tacoma, claims for refund of said payment of deficiencies and interest amounting to the said sum of \$6,815.32, and that full, true and correct copies of such claims are hereto attached, marked Exhibits A and B, and by this reference made a part hereof.

VI.

That thereafter under date of December 13, 1940, the Commissioner of Internal Revenue notified the plaintiff of the rejection of such claims in their entirety and that copy of such notice is hereto attached, marked Exhibit C, and by this reference made a part hereof; that in spite of such notice of total rejection of claims there has been refunded to the plaintiff the sum of \$121.34 determined as an overpayment of interest on the assessments above mentioned and which is properly to be credited in reduction thereof.

VII.

That at no time during the last half of the taxable years [3] 1937 and 1938 was 50% in value or more of the outstanding stock of the plaintiff held either directly or indirectly by or for not more than five individuals and that plaintiff was not a personal holding company nor was it subject to tax as a personal holding company nor to the filing

of a personal holding company return for either of said years, and that the entire amount of payments above set forth were unjustly and unlawfully demanded and collected of and from the plaintiff; that by reason thereof plaintiff is entitled to recover from the defendant the said sum of \$6,815.32, less credit for the said sum of \$121.34, making a total amount due the plaintiff from the said defendant \$6,693.98, together with interest thereon from the 8th day of July, 1940.

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$6,693.98, together with 6% interest thereon from the 8th day of July, 1940, together with its costs and disbursements herein.

JONES & BRONSON

(Signed) **H. B. JONES**

Attorneys for Plaintiff

[Endorsed]: Filed Feb. 19, 1941. [4]

EXHIBIT "A"

CLAIM

Form 843

**Treasury Department
Internal Revenue Service
(Revised April 1940)**

**To Be Filed With the Collector Where Assessment
Was Made or Tax Paid**

Collector's Stamp—(Date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- [] Refund of Tax Illegally Collected.
- [] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- [] Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Washington

County of King—ss:

Type or Print

Name of taxpayer or purchaser of stamps—
Washmont Corporation.

Business address—Marion Building, Seattle,
Washington

Residence.....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—
Tacoma

2. Period (if for income tax, make separate form for each taxable year) from 1-1-37, 19.., to 12-31-37, 19..

3. Character of assessment or tax—Income taxes

4. Amount of assessment, \$2,759.71 prin, 685.55 penalty, 478.56 int. on July 8, 1940.

5. Date stamps were purchased from the Government —

6. Amount to be refunded—\$3,923.82

7. Amount to be abated (not applicable to income or estate taxes)—\$.

8. The time within which this claim may be legally filed expires, under Section 322(b) IRC of the Revenue Act of 19. . . ., on July 8, 1942.

The deponent verily believes that this claim should be allowed for the following reasons:

The additional assessment results from holding that the taxpayer was a personal holding company subject to taxation under Section 351 (a) of the Revenue Act of 1936 and to a penalty for failure to file a personal holding company return. In reaching such conclusion the Commissioner has disregarded the status of certain participating dividend debentures of the taxpayer company amounting to \$625,000.00 and held the same to constitute indebtedness of the company and not a stock or equity interest. Such debentures, however, were in fact and in law not part of the general indebtedness of the taxpayer company but represented a stock or share holding interest therein subject and subordinate, both currently and upon liquidation, to the general indebtedness of the company and representing capital at risk in the conduct of taxpayer's business. Said debentures were, during the taxable period, owned and held by a corporation. At no time during the taxable year was 50% in value of the outstanding stock of the taxpayer, including such participating dividend debentures,

owned, either directly or indirectly, by or for more than five individuals.

(Signed) WASHMONT CORPORATION

By _____

Sworn to and subscribed before me this 18th day of July, 1940.

....., Notary Public.

(Signature of officer administering oath)

(See Instructions on Reverse Side) [5]

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax: (Show, in the ninth column, by symbols "Pd.," "Ab.," or "Cr.," the nature of each entry in the eighth column.)

Claim No.

Class of tax and taxable year or period.

Assessment List. List—Month—Year.

Account No. or Page, Line.

Amount assessed \$. Total, \$.

Paid, Abated, or Credited. Date—Amount, \$. . . .

Total, \$.

I certify that the records of this office show the following facts as to the purchase of stamps:

To Whom Sold or Issued—Kind—Number—Denomination—Date of sale or issue—Amount \$.

If special tax stamp, state: Serial number—Period commencing—

.....
Collector of Internal Revenue. (District)

Claim examined by—

Claim approved by—

Chief of Division.

Amount claimed..... \$._____

Amount allowed..... \$._____

Amount rejected..... \$._____

Committee on Claims

.....

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or

other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, followed by the signature and title of the officer having authority to sign for the corporation.

EXHIBIT "B"

CLAIM

Form 843

Treasury Department
Internal Revenue Service
(Revised April 1940)

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp—(Date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- [] Refund of Tax Illegally Collected.
[] Refund of Amount Paid for Stamps Unused,
or Used in Error or Excess.

[] Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Washington

County of King—ss:

Type or Print.

Name of taxpayer or purchaser of stamps—Washmont Corporation.

Business address—Marion Building, Seattle, Washington.

Residence.....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—Tacoma.

2. Period (if for income tax, make separate form for each taxable year) from 1-1-38, 19....., to 12-31-38, 19..... .

3. Character of assessment or tax—Income taxes.

4. Amount of assessment, \$2,097.16 prin, 582.88 penalty, 211.46 int. on July 8, 1940.

5. Date stamps were purchased from the Government—

6. Amount to be refunded—2,891.50 \$2,891.50

7. Amount to be abated (not applicable to income or estate taxes) \$.....

8. The time within which this claim may be legally filed expires, under Section 322(b) IRC of the Revenue Act of 19....., on July 8, 1942.

The deponent verily believes that this claim should be allowed for the following reasons:

The additional assessment results from holding that the taxpayer was a personal holding company subject to taxation under Section 401 of the Revenue Act of 1938 and to a penalty for failure to file a personal holding company return. In reaching such conclusion the Commissioner has disregarded the status of certain participating dividend debentures of the taxpayer company amounting to \$625,000.00 and held the same to constitute indebtedness of the company and not a stock or equity interest. Such debentures, however, were in fact and in law not part of the general indebtedness of the taxpayer company but represented a stock or share holding interest therein subject and subordinate, both currently and upon liquidation, to the general indebtedness of the company and representing capital at risk in the conduct of taxpayer's business. Said debentures were, during the taxable period, owned and held by a corporation. At no time during the taxable year was 50% in value of the outstanding stock of the taxpayer, including such participating dividend debentures, owned, either directly or indirectly, by or for more than five individuals.

(Signed) WASHMONT CORPORATION

By

Sworn to and subscribed before me this 18th day of July, 1940.

....., Notary Public
(Signature of officer administering oath) (Title)

(See Instructions on Reverse Side) [6]

CERTIFICATE

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax: (Show, in the ninth column, by symbols "Pd.," "Ab.," or "Cr.," the nature of each entry in the eighth column.)

Claim No.....

Class of tax and taxable year or period.

Assessment List—List—Month—Year.

Account No. or Page, Line.

Amount assessed \$..... Total, \$.....

Paid, Abated, or Credited—

Date—Amount \$..... Total, \$.....

I certify that the records of this office show the following facts as to the purchase of stamps:

To Whom Sold or Issued—Kind—Number—Denomination—Date of sale or issue—Amount \$.....

If special tax stamp, state: Serial number—Period commencing—.

.....,
Collector of Internal Revenue. (District)

Claim examined by—

Claim approved by—

Chief of Division.

Amount claimed..... \$.....

Amount allowed..... \$.....

Amount rejected..... \$.....

Committee on Claims

.....
.....
.....

Instructions

1. The claim must set forth in detail and under oath each ground upon which it is made, and facts sufficient to apprise the Commissioner of the exact basis thereof.

2. The claim should be sworn to by the taxpayer, if possible. Whenever it is necessary to have the claim executed by an attorney or agent, on behalf of the taxpayer, an authenticated copy of the document specifically authorizing such agent or attorney to sign the claim on behalf of the taxpayer shall accompany the claim. The oath will be administered without charge by any collector, deputy collector, or internal revenue agent.

3. If a return is filed by an individual and a refund claim is thereafter filed by a legal representative of the deceased, certified copies of the letters testamentary, letters of administration, or other similar evidence must be annexed to the claim, to show the authority of the executor, administrator, or other fiduciary by whom the claim is filed. If an executor, administrator, guardian, trustee, receiver, or other fiduciary files a return and thereafter refund claim is filed by the same fiduciary, documentary evidence to establish the legal authority of the fiduciary need not accompany the claim, provided a statement is made on the claim showing that the return was filed by the fiduciary and that the latter is still acting.

4. Where the taxpayer is a corporation, the claim shall be signed with the corporate name, fol-

lowed by the signature and title of the officer having authority to sign for the corporation.

EXHIBIT "C"

TREASURY DEPARTMENT

Washington

Dec. 13, 1940

IT:Cl:CC:4-CCP

Washmont Corporation,
Marion Building
Seattle, Washington

In re: Claims for refund of \$3,923.82 and \$2,-
891.50

Sirs: For the years 1937 and 1938

Reference is made to the revenue agent's report upon an investigation of your tax liability dated Oct. 30, 1940, a copy of which was forwarded you, wherein you were informed that the claims for refund indicated above will be disallowed.

In accordance with the provisions of existing internal revenue law, notice is hereby given of the disallowance of your claims in full.

Respectfully,

GUY T. HELVERING,

Commissioner.

By J. MOONEY,

Deputy Commissioner.

724M

[Endorsed]: Filed Feb. 19, 1941. [7]

[Title of District Court and Cause.]

AMENDED ANSWER

Comes now the defendant above named by and through his counsel, J. Charles Dennis, United States Attorney for the Western District of Washington, Harry Sager, Assistant United States Attorney for said District, and Thomas R. Winter, General Counsel Representative, Bureau of Internal Revenue, and for his Amended Answer to the Complaint of the plaintiff herein, admits, denies and alleges as follows, to-wit:

I.

Defendant admits the allegations contained in paragraphs I, II, III, IV, V and VI of plaintiff's complaint.

II.

Answering paragraph VII of plaintiff's complaint, defendant denies the same and the whole thereof.

Further answering said complaint, and by way of Further and Alternative Defense thereto, defendant alleges:

I.

In the event the Court should find that the plaintiff herein during the years 1937 and 1938 was not a personal holding corporation within the meaning of such term as [8] provided by statute, but was an ordinary corporation and was taxable as such, then the defendant alleges that even in such event the

plaintiff underpaid its tax liability by reason of the following facts:

(1) That for the year 1937, plaintiff in the computation of its net income deducted from its gross income \$50,000.00 as interest on indebtedness, and for the year 1938, it deducted \$31,250.00 as interest on indebtedness; that such deductions were allowed by the Commissioner of Internal Revenue in his determination of the tax liability of plaintiff for said years upon the theory that the debenture certificates involved in this action were debts of the plaintiff and were not shares of its capital stock.

(2) That if it should be determined in this cause that the said debenture certificates are shares of stock of the plaintiff corporation, that then the deduction of the aforesaid sums of \$50,000.00 and \$31,250.00, was a wrongful deduction from the gross income of the plaintiff, and the amount of plaintiff's recovery herein should be reduced by the income and excess profits tax attributable to such wrongful deductions.

Wherefore, having fully answered the plaintiff's complaint herein, defendant prays that the plaintiff take nothing by this action and that the said complaint be dismissed without cost to defendant herein. In the alternative, defendant prays that in the event the Court shall determine the plaintiff is entitled to recover under the prayer of its complaint herein, that the amount of recovery be reduced by the income and excess profits tax [9] attributable to the wrongful deduction for the years 1937 and

1938 of the amounts of \$50,000.00 and \$31,250.00 respectively.

J. CHARLES DENNIS

United States Attorney.

HARRY SAGER

Assistant United States
Attorney.

THOMAS R. WINTER

General Counsel Representa-
tive, Bureau of Internal
Revenue.

Attorneys for Defendant.

[Endorsed]: Filed Oct. 22, 1941. [10]

[Title of District Court and Cause.]

MEMORANDUM DECISION

The Court: This in all respects takes the place of the Court's oral decision as announced from the bench January 15, 1942, and said oral decision as then announced is hereby stricken and further held for naught.

The decision of the Court will not be based upon the fact that the issuance of the debenture certificates involved in this case may not have been in accordance with the State law governing the issuance of corporate capital stock. The Court will lay aside any consideration of that point.

Likewise, the Court's decision will not be based upon the contention made by defendant's counsel

that, because of the rule relating to options to purchase or acquire stock, the taxpayer corporation was in legal effect the owner of the debentures by virtue of the redemption accelerating provision of the debenture certificate.

We have here a question of whether a certain written instrument (the debenture certificate) is of the nature of an indebtedness against the corporation issuing it, or [11] whether it is of the nature of a stockholder's interest in the corporation.

There is no question but that the dominant intention of the incorporators was to prevent this instrument from being what we ordinarily understand as a legal stockholder's certificate, that is, an instrument making the holder a stockholder legally entitled to participate in the corporate affairs of the corporation issuing this certificate. The dominant purpose was to prevent that.

In order to induce the prospective certificate holder to be satisfied with its nature, whatever its nature was, and to be satisfied to give up the voice that a legal stockholder might have in the corporation, the certificate, among other provisions, did make the certificate holder entitled to a guaranteed interest rate,—the very small rate of 3%,—and also gave the certificate holder the right to participate in any distribution of assets, or in something over and above the face value of the certificate and accrued interest and participating benefits, in the nature of an accelerated distribution right in the corporate assets, along with the stockholders, in case the de-

benture should be called for redemption prior to normal redemption.

But the written terms of the certificate, in stating the obligations of the corporation, are more of the nature of indebtedness than they are of the nature of shares of stock. This is in the certificate manifested by an acknowledgment of the corporation's indebtedness and by an absolute promise to pay the face value of the certificate (and interest and participating benefits, to be conditionally paid) and by a provision giving the certificate holder a [12] lien on all the corporation's property, present and future, to secure the payment of its obligations under the certificate.

The validity of the lien in the absence of notice of it is questioned by the plaintiff corporation, but in this proceeding there would seem no basis for such questioning by the corporation itself or its incorporators as against the debenture holders, because all of them have actual notice of the lien, and the record now discloses no others interested in and opposing the lien provisions.

No doubt there was a secondary intention in the minds of the incorporators to permit the prospective holder or holders of these certificates to have some contingent equitable interest in the corporate assets; but it was their primary intention at the time of the creation and issuance of these certificates, that they should not be stock.

It was to the interest of the corporation, as interpreted by the management of it, to issue these de-

benture certificates, because in doing so the taxpayer corporation was obtaining some valuable voting stocks in certain brewery corporations, and was also obtaining a certain limited sum of money,—limited in the sense of being not so great as the par value of the brewery stock received in payment for the issuance of the debenture certificates.

The corporation very likely held out to the prospective certificate holder as much inducement as was available; and I dare say that one of the talking points was the contingent interest which the certificate holder was to have in the assets of the corporation in case of a dissolution of the taxpayer corporation or in case of the calling in and [13] maturing of the debenture certificates before normal redemption.

Now, then, respecting the actual intention of the corporation and its management after the certificates were issued, it appears when the corporation desired to obtain loans from the bank that it did then intend, and I believe the evidence establishes that it then did actually intend, that these certificates should be regarded as shares of equitable stock interest in the company, and apparently the president of the corporation when seeking the loan from the bank entertained no doubt at all in his mind that the certificates had that effect.

On the other hand, it just as clearly appears that, when the corporation went to compute and pay its income taxes, it on that occasion just as clearly intended that the nature of these certificates should

be indebtedness, and not stock of any nature, and claimed as a deduction from gross income the interest paid on such debenture certificates as interest paid on corporate debts.

So we have a situation that, when the corporation wanted to borrow money from the bank, it intended that the certificates of debenture should be regarded as stock; but when the corporation was paying its income tax, it then intended that such debentures should be regarded as debts. It seems reasonable to conclude from the evidence that the corporation's financial interest was the factor determining whether the corporation would regard the debentures as corporate stock or corporate debt. The corporation obtained a financial benefit through the bank loans by regarding and representing the debentures as stock instead of debt, because [14] the bank would not have made the loans if the debentures had been regarded as debt (Tr. 38). Obviously it was to the corporation's financial interest when making its income tax returns to reduce the amount of its tax by claiming as a deduction from gross income the interest it had paid on the debentures, and that could be done only by asserting (and the corporation did so assert) that the debentures were corporate debts instead of stock.

And so the intention of the taxpayer when borrowing money that the debentures should be regarded as corporate stock offsets the taxpayer's intention when computing and paying income tax that the debentures be regarded as corporate debt. Such

conflicting intention nullifies any aid that the Court, when construing these debentures, might get from the corporation's attitude respecting the nature of the debenture certificates, and, in the absence of other convincing evidence of the intention of either the corporation or the certificate holders, the Court is left to determine the nature of the debentures and the intention of the issuer and holders thereof from the writing itself.

As has already been indicated, the writing itself primarily and essentially is the statement of a debt, because it contains an acknowledgment of a certain present amount of indebtedness with an absolute promise to pay that amount (with interest payable out of net earnings and certain other ascertainable contingent benefits) at a definite time in the future, with provision for accelerating maturity, all obligations being secured by lien on all of the corporation's property, notwithstanding participating dividend and asset distribution features. Plaintiff taxpayer has failed to [15] establish that the debentures are corporate capital stock investments at the risk of the business of the corporation.

Considering what has been said and all the evidence in this case, the Court finds, concludes and decides that plaintiff taxpayer is a personal holding corporation with less than five stockholders and without right to recover back the tax it has previously paid and herein seeks to recover, and that the plaintiff's action should be dismissed.

Do you wish the matter continued to a definite

time to settle the findings, conclusions and judgment, or do you wish——

Mr. Jones: (Interposing) I would rather if your Honor would leave it open. We will get to it as soon as possible. There are some matters that I would want to prepare findings on. I will expect to ask your Honor to make a specific finding under the evidence of intent at the time of the incorporation. Your Honor didn't mention it.

The Court: Well, at that time I think the intention of the corporation was that these should be certificates of indebtedness, rather than certificates of shareholder's interest.

Mr. Jones: Your Honor has in mind the positive testimony of Mr. Chadwick and Mr. Sick on that point?

The Court: I just feel that—that is my construction of the whole thing. I feel that the written instrument has to govern that intention. They had a secondary intent, Mr. Jones; I believe that they had a secondary intent to let the certificate holder in some respects share in the corporation's asset distribution if there ever came one, or if there ever came an accelerated maturing of the indebtedness. But [16] I do not think the incorporators actually intended, as distinguished from the written expression of such intent, a primary intent other than what the written statement expressed.

Mr. Jones: I mention this because, while the thing is fresh in your mind, it might be well to express this point. Does your Honor have in mind

that Mr. Sick was acting, at the time of the incorporation, not only for the new corporation, Washmont, but also for Associated, and that the testimony showed that Mr. Kerr, one of the directors of Associated, and Mr. Bronson as its attorney, were parties to this understanding? There was no testimony about Mr. Bronson particularly, but there was that Mr. Sick, as representative of Associated, and Mr. Kerr, as director of Associated, were advised and approved of the set-up as being a set-up of a stock-owning interest by Associated or an investment interest by Associated?

The Court: One reason for my feeling that way about it, Mr. Jones, is that there isn't any question about the outstanding ability of legal counsel connected with the set-up of this corporation, and they and their clients knew the difference between a debt and stock, and they expressed what they then and there primarily intended to express, in my opinion, with this secondary subordinate intention that I have discussed.

Mr. Jones: I just thought it was fair to raise these matters now while it is fresh in mind, and we will raise them by proposed findings.

The Court: The corporations were represented by outstandingly able lawyers, who undoubtedly appreciated and advised their clients of the full situation here presented in [17] these issues.

JOHN C. BOWEN

U. S. District Judge

[Endorsed]: Filed Jan. 19, 1942. [18]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This cause having come on regularly for trial before the undersigned Judge of the above-entitled Court on the 28th day of October, 1941, the plaintiff having appeared and having been represented by Jones & Bronson, and the defendant having appeared and having been represented by J. Charles Dennis, United States Attorney for the Western District of Washington, Harry Sager, Assistant United States Attorney for said district, and Thomas R. Winter, Special Attorney, Bureau of Internal Revenue, his attorneys; and witnesses having been sworn and having testified on behalf of plaintiff and defendant, and exhibits having been introduced in evidence and at the close of the trial, the cause having been taken under advisement and for the submission of briefs, and such briefs having been submitted, and after supplemental proof on January 15, 1942, and oral argument the Court, on January 19, 1942, having filed its memorandum decision herein, and the Court being fully advised, now makes the following:

FINDINGS OF FACT

I.

That the defendant herein, prior to the 8th day of July, 1940, was and at all times material to this action has been, the Acting Collector of Internal

Revenue [19] for the Collection District of Washington, having his office and residing at the City of Tacoma within the jurisdiction of this court; that the acts done by the defendant as herein alleged were done by him in his representative capacity and under and pursuant to the directions of the Commissioner of Internal Revenue of the United States.

II.

That the plaintiff is and at all times herein mentioned was a corporation organized and existing under the laws of the State of Washington and having its principal place of business at the City of Seattle, King County therein, and making its returns under the Federal income and excess-profits acts to the Collector of Internal Revenue at Tacoma, Washington; that plaintiff has at all times borne true faith and allegiance to the government of the United States and has not in any way aided, abetted or given encouragement or comfort to any person, persons or government in rebellion against the United States, nor has it aided, abetted or given encouragement to any sovereign or government which has been or is at war with the United States.

III.

That pursuant to the requirements of the Federal income and excess-profits tax laws (now Internal Revenue Code) then in force and effect, the plaintiff duly filed its income tax returns with the de-

fendant for the taxable years 1937 and 1938 as an ordinary corporation, and within due time paid to the defendant all tax liability arising thereunder.

IV.

That thereafter the Commissioner of Internal Revenue caused an audit to be made of said returns as a result of which he held and determined that during each of said years the plaintiff constituted a personal holding company and was [20] subject to tax as such under and pursuant to provisions of Section 351 of the Revenue Act of 1936, as amended by the Revenue Act of 1937 and Section 401 of the Revenue Act of 1938, the provisions of which acts, with reference to the matter here in controversy, are substantially identical. The Commissioner of Internal Revenue further held that the plaintiff was required to file and was delinquent by reason of not filing a return as a personal holding company on Form 1120-H for each of said years. Thereupon and by reason of such holding and determination the Commissioner of Internal Revenue held that this plaintiff was subject to assessment for and he did thereupon determine and assess a deficiency in income taxes under the personal holding company sections of the applicable revenue acts in the sum of \$2,759.71, together with a penalty for failure to file a personal holding company return of \$685.55, making a total of \$3,445.26 for the year 1937 and of \$2,097.16, together with a penalty for failure to file a personal holding company return of \$582.88, making a total of \$2,680.04 for the year 1938.

V.

That thereafter and pursuant to such determination of the Commissioner of Internal Revenue and on or about July 8, 1940, the plaintiff paid to the defendant, as Acting Collector of Internal Revenue for the Collection District of Tacoma, the sum of \$6,815.32, being the amount of said deficiencies and interest thereon as above set forth, together with interest applicable to the deficiency for 1937 amounting to \$478.56 and for the year 1938 amounting to \$211.46.

That thereafter and on or about July 19, 1940, plaintiff [21] filed with the defendant, as Acting Collector of Internal Revenue for the Collection District of Tacoma, claims for refund of said payment of deficiencies and interest amounting to the said sum of \$6,815.32.

VI.

That thereafter under date of December 13, 1940, the Commissioner of Internal Revenue notified the plaintiff in writing of the rejection of said claims in their entirety except there has been refunded to the plaintiff the sum of \$121.34 determined as an overpayment of interest on the assessments above mentioned and which is properly to be credited in reduction thereof.

VII.

That the Associated Breweries of Canada, Ltd., was a corporation organized under the laws of the

Dominion of Canada and at no time during 1937 and 1938 was fifty percentum or more in value of its outstanding stock held directly or indirectly by or for five or less individual stockholders.

VIII.

That, as more fully appears from the Court's memorandum decision filed January 19, 1942, hereby made part hereof, plaintiff's incorporators at the time of the issuance of the debenture certificates intended them to represent indebtedness of the plaintiff and not legal stockholder interest in plaintiff; that by the written terms of the certificates themselves, they created and were intended to create an indebtedness against the plaintiff corporation rather than a stockholder's interest therein, which fact is in the certificates manifested by an acknowledgment of the corporation's indebtedness for, and by an absolute promise to pay, the face value of the certificate (with interest and participating benefits to be conditionally paid) and by a provision [22] giving the certificate holder a lien on all of the plaintiff corporation's property, present and future, to secure the payment of its obligations under the certificates.

IX.

The income realized by the plaintiff which was not a regular dealer in stocks and securities during the taxable years 1937 and 1938 was derived from royalties, dividends, interest and/or gains from the sale of stock or securities and during the last half

of each of those taxable years more than fifty per centum in value of its outstanding stock was owned directly or indirectly by not more than five individuals.

From the above and foregoing Findings of Fact, the Court deduces the following:

CONCLUSIONS OF LAW

I.

That the income, realized by the plaintiff corporation for the taxable years 1937 and 1938, meets the requirements of Section 351 of the Revenue Act of 1936 as amended by the Revenue Act of 1937 and Section 402 of the Revenue Act of 1938 and during the last half of said years, more than fifty per centum in value of its outstanding stock was owned directly or indirectly by not more than five individuals, and the plaintiff was a personal holding company for the years 1937 and 1938 within the meaning of said statutes.

II.

That the taxes, penalties and interest assessed and collected were in all respects legal and in strict accordance with the law.

III.

That plaintiff's alleged cause of action should be [23] dismissed with prejudice and with costs to the defendant.

Done in Open Court This 4th Day of March, 1942.

JOHN C. BOWEN

United States District Judge

Presented by:

THOS. R. WINTER

Special Attorney, Bureau of
Internal Revenue.

[Endorsed]: Filed Mar. 4, 1942. [24]

United States District Court
Western District of Washington
Southern Division

No. 216—Tacoma

WASHMONT CORPORATION, a corporation,
Plaintiff,

v.

THOR W. HENRICKSEN, individually and as
Acting Collector of Internal Revenue for the
Western District of Washington, Southern Di-
vision,

Defendant.

JUDGMENT

This cause having come on regularly for trial before the undersigned Judge of the above-entitled Court on the 28th day of October, 1941, the plaintiff having appeared and having been represented by Jones & Bronson, and the defendant having appeared and having been represented by J. Charles Dennis, United States Attorney for the Western District of Washington, Harry Sager, Assistant

United States Attorney for said district, and Thomas R. Winter, Special Attorney, Bureau of Internal Revenue, his attorneys; and witnesses having been sworn and having testified on behalf of plaintiff and defendant, and exhibits having been introduced in evidence and at the close of the trial, the cause having been taken under advisement and for the submission of briefs and such briefs having been submitted, and after supplemental proof on January 15, 1942, and oral argument, the Court, on January 19, 1942, having filed its memorandum decision herein, and the Court having heretofore made and entered its Findings of Fact and Conclusions of Law, and being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that the above-entitled action be, and the same is hereby dismissed [25] with prejudice and with costs to the defendant to be taxed by the Clerk.

Done in open court this 4th day of March, 1942.

JOHN C. BOWEN

United States District Judge

Presented by:

THOMAS R. WINTER.

[Endorsed]: Filed Mar. 4, 1942. [26]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Washmont Corporation, plaintiff above named, hereby appeals to the

Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 4, 1942.

Signed: JONES & BRONSON

H. B. JONES

Attorneys for Plaintiff

Address: 610 Colman Building

Seattle, Washington

Copy delivered to U. S. Attorney, Tacoma, and copy mailed to Thos. R. Winter, Seattle, May 26, 1942.

E. REDMAYNE,

Dep. Clerk

[Endorsed]: Filed May 25, 1942. [27]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS ON
APPEAL

Washmont Corporation, plaintiff above named, having taken an appeal from the judgment herein, hereby states the points on which it intends to rely on the appeal, as follows:

I.

During the years 1937 and 1938, Washmont Corporation was not a personal holding company within the provisions of Section 351 of the Revenue Act of 1936 as amended by the Revenue Act of 1937 and Section 402 of the Revenue Act of 1938, as deter-

mined by the Commissioner, for the reason that its outstanding issue of \$625,000.00 par value securities, denominated "Participating Dividend Debentures", was not, and was not intended to be, a debt, but was, and was intended to be in fact and in law a proprietary interest in said corporation, representing capital at risk in the business, and that therefore fifty per cent (50%) or more of the outstanding stock of said Washmont Corporation was not owned directly or indirectly by not more than five (5) individuals at any time during the last half of said years.

II.

In the creation of Washmont Corporation and the issuance of said debentures, and at all times thereafter, it was the intent and purpose of Washmont Corporation and of Associated Breweries of [28] Canada, Ltd., to which said debentures were issued, and by which they were held, that the said debentures should not constitute a debt of Washmont Corporation, but should represent a proprietary interest constituting capital at risk in the business of Washmont Corporation.

III.

That said debentures constituted an outstanding stock interest of Washmont Corporation during said years, and should be considered as stock in determining the status of Washmont Corporation as a personal holding company during said years.

IV.

In determining the purpose and intent of Washmont Corporation in issuing said debentures and of Associated Breweries of Canada Ltd., in receiving them, and the character of such securities with reference to the personal holding company status of Washmont Corporation, the Court should have considered and received in evidence the offer made by the plaintiff establishing that in April 1940, immediately after the Commissioner of Internal Revenue determined that Washmont Corporation was a personal holding company during 1937 and 1938 by reason of said debentures being outstanding, the said Washmont Corporation issued and exchanged for said debentures and Associated Breweries of Canada Ltd., holders of said debentures, accepted in exchange therefor a like amount of par value preferred stock.

(Signed) H. B. JONES

Attorneys for Appellant

Copy received this 5th day of Aug., 1942.

THOMAS R. WINTER

[Endorsed]: Filed Aug. 11, 1942. [29]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF EVIDENCE

The above entitled action came on regularly for hearing October 28, 1941 before Honorable John C.

Bowen, sitting without a jury, in the above entitled court at Tacoma, Washington.

Plaintiff appeared by its attorneys H. B. Jones and R. B. Hooper of Jones and Bronson of Seattle, Washington; and Defendant by his attorneys J. Charles Dennis, United States District Attorney, Harry Sager, Assistant United States District Attorney, and Thomas R. Winter, Special Attorney, Bureau of Internal Revenue, all of Seattle, Washington.

The opening statements of Counsel having been made, there was offered by the plaintiff and received in evidence as plaintiff's Exhibit 1, the statutory 90 day assessment letter addressed by the Commissioner of Internal Revenue to the plaintiff dated June 28, 1940 relating to deficiency for the calendar year 1937 setting forth a deficiency and penalty as alleged in Paragraph IV of plaintiff's complaint, based upon the determination that plaintiff was a personal holding company and had failed to file a return as such for each of said years.

ALBERT BRYGGER

was thereupon called on behalf of the plaintiff herein, and having been first duly sworn, testified as follows: [30]

I am a resident of Seattle, and am, and was in 1937, president of the People's National Bank of Washington, I know Mr. Emil G. Sick and the Washmont Corporation; the Bank handled their

(Testimony of Albert Brygger.)

banking business and has done so since 1937. In October, 1937, at the request of Mr. Sick, a loan was made to the Washmont Corporation; on October 7th, Mr. Sick and I had a telephone conversation concerning his desire to borrow \$22,000.00 on behalf of the Washmont Corporation. I asked Mr. Sick about the Washmont Corporation; he said that it had no debts, that it had a capital of \$25,000.00 and that the company had issued participating dividend debentures in the amount of \$625,000.00 which were owned by the Associated Breweries. After his assertion that they were considered as capital, I made him the loan of \$22,000.00. I knew that I was talking to Mr. Sick over the telephone at that time; I have talked to him so much that I couldn't fail to recognize his voice.

I kept a memorandum of this conversation, and the representations made to me. It was prepared two or three hours after the conversation and its purpose was to create a record in the credit files of the bank so that other officers might know about the transaction. In our particular Bank it is customary for each man to make a report of this kind with respect to customers interviewed each day. This record was made in accordance with that practice.

In the consideration of this loan by the bank's executive committee, the representation was made that the entire amount of the debentures were capital and not debt. If we had considered them a debt, we of course would never have made the loan, because the debt would have been too large.

(Testimony of Albert Brygger.)

Other loans were made with Mr. Sick after this one over a period from 1937, to January 4th, 1940. During the course of these transactions I had further conversations with Mr. Sick *con-* [31] concerning the character of the debentures, to the effect that they were capital of the company.

These transactions ran over a period from 1937 to January 4, 1940, and the dates and amounts were as follows:

October 7, 1937	\$22,000
December 22, 1938	10,000
June 2, 1938	25,000
June 20, 1938	40,000
August 24, 1938	35,000
November 12, 1938	4,000
May 29, 1939	5,000
January 4, 1940	12,500

I have a memorandum of a conversation with respect to each of these loans. They kept the record in the credit files prepared within two or three hours after each conversation. Each man in our bank writes down the name of the customer he interviews, and at the end of the day dictates for the credit file the circumstances of the conversation with the customer, and whether or not he granted or declined the loan. I have with me the various memoranda prepared in this way with respect to loans to Washmont Corporation which were put in the credit files of the bank and kept there ever since.

(The memoranda so produced was identified as plaintiff's Exhibit 2 and offered in evidence

(Testimony of Albert Brygger.)

by the plaintiff, to which an objection was made and sustained.)

The pertinent portions of said Exhibit 2 for identification are as follows:

“WASHMONT CORPORATION”

“October 7, 1937—

“The Washmont Corporation has total assets of \$667,000 with no liabilities other than capital, and is a holding company for brewery stock with ownership in the Sick family. Their statement shows participating debentures of \$625,000. These debentures are owned by the Sicks and considered by them to be capital.

“June 2, 1938—

“Obtained a new statement which shows investments [32] in the following companies:

Stocks of U.S. companies aggregating \$626,693.10, Total assets \$657,097.00, and their only debt is a \$4000 mortgage payable; \$5226 reserve for taxes; they have participating debentures outstanding of \$625,000, and capital and surplus of \$22,800.”

Cross-Examination

I understood that Washmont Corporation was a holding company of brewery stocks. Mr. Sick told me that there were participating dividend debentures of that company issued and outstanding in October, 1937. I did not know at that time that Mr. Sick had also transferred to Washmont Corporation 1000 shares of stock of the Seattle Brewing and

(Testimony of Albert Brygger.)

Malting Company. I understood that Associated Breweries Ltd., were the stockholders of the Washmont Company by virtue of the debenture certificates. This was what Mr. Sick told me. The loan was made to the Washmont Corporation on the basis of what he told me, and on the basis of his credit and that of Washmont Corporation. He did not personally endorse any of the obligations.

On October 7, 1937, I understood that Mr. Sick and the Associated Breweries were the stockholders of the Washmont Corporation. At that time there were outstanding in participating dividend debentures \$625,000 and the total assets at that time were about \$667,000. We contemplated loaning him \$22,000; we would require more than double this amount in security in marketable stocks and bonds, and if there had been a debt of \$625,000 against them no loan would have been made. Mr. Sick said that there were no liabilities and I took his word for it, which is standard banking practice with some people.

STEPHEN F. CHADWICK

was thereupon called on behalf of the plaintiff herein, and having been first duly sworn, testified as follows:

I am an attorney and have practiced in the City of Seattle [33] since 1915. I was the attorney who set up the Washmont incorporation; was one of the

(Testimony of Stephen F. Chadwick.)

incorporators, and have been a trustee and director in the corporation since its organization.

I was requested by Mr. Sick to organize the Washmont Corporation. My conversations prior to its organization were with Mr. Sick and Mr. R. H. B. Ker, of Victoria, B. C., who is one of the men principally interested in, and a director of the Associated Breweries Ltd., of Canada; Mr. Robert Bronson, at that time, was retained as counsel for the Associated Breweries in the State of Washington and, in the preliminaries of setting up the corporation, I talked with and submitted the articles and plans for the corporation to him before it was finally set up.

Mr. Sick was president of the Associated Breweries and also president of Seattle Brewing and Malting Company. Mr. Ker was a director and, I believe, vice president.

The issuance of the debentures was in our minds at the time the articles of incorporation were prepared and the steps had been fully discussed between all of us. The occasion for the formation of the corporation was that the Associated Breweries Ltd., of Canada, was a Canadian Corporation. It was considered desirable to bring the voting control of that stock into the State of Washington and lodge it with a citizen of that state, and Mr. Sick came into that position. A corporation was set up with the intent and endeavor on my part to create a situation where the Associated would share on an equality and parity with such investment as Mr.

(Testimony of Stephen F. Chadwick.)

Sick might wish to make in the Washmont Corporation. In April 1937, when the Corporation was being set up, there was a discussion among Mr. Sick and Mr. Ker and myself relative to the position that the debentures would occupy with reference to the claims of general creditors of the company. The stocks were to be brought down and these participating dividend debentures were to be [34] issued. We agreed upon three per cent as a figure which the corporation would be sure to be able to pay as a dividend in any one year; accordingly, we set up a provision that if it were earned, three per cent would be paid on the participating dividend debentures. Then, after three per cent was paid on the stock of the corporation, the participating dividend debentures would share equally in all earnings of the corporation which might be available for declaration of dividends. There was specific discussion as to the relation of the debentures to the claims of general creditors and it was agreed that the interests of Associated and Mr. Sick would be equally at hazard with reference to such claims.

I drew the debentures, and in so doing it was my intention to create a stock interest in the company to the extent of a right to participate in the earnings or to be impressed with the liabilities of the company, though not strictly a stock in the sense of represented stock on file with the Secretary of State.

The witness was then asked what change was made in the corporate structure of Washmont Corporation, after the question was raised by the gov-

(Testimony of Stephen F. Chadwick.)

ernment as to whether the debentures were a debt or a stock interest, and what was the occasion for such change, to which objection was made and sustained. Thereupon Counsel for plaintiff made the following offer of proof:

“Mr. Jones: I offer to prove at this time, then, by this witness (I think I should make an offer of proof for the record) that upon the issue being raised by the Revenue Agent’s office that he would interpret this to be an evidence of debt rather than a stockholding interest, that the witness, acting for the Washmont Corporation and with the consent of the Associated, forthwith took steps to cause the debentures to be surrendered and replaced by issuing what was denominated “preferred stock” and that was the sole reason for taking [35] that step and no other.

“Mr. Winter: We object on the ground it is not relevant to the issues in this case as to what was done later, isn’t here involved. The question is whether or not the so-called debentures, were, in effect, evidence of indebtedness or whether the stockholders had showed stock ownership in the corporation.

“The Court: The objection is sustained on the time element, particularly.”

Cross-Examination

The articles of incorporation and by-laws of Washmont Corporation were offered and received in evidence as plaintiff’s Exhibit 3 and so far as material are as follows:

(Testimony of Stephen F. Chadwick.)

“ARTICLES OF INCORPORATION

ARTICLE IV.

“The purposes and objects for which this corporation is formed are as follows:

“1. To subscribe for, purchase or otherwise acquire, to sell, exchange, pledge or otherwise dispose of, for its own account and/or the account of others, of shares of stock, debentures, bonds or other securities issued by any individual, corporation, association or partnership or issued by and public authority, whether governmental, foreign, domestic, municipal, local or otherwise.

“2. To purchase, acquire, sell, exchange, hypothecate, pledge, mortgage or otherwise deal in, and to dispose of, all choses in action, real, personal or mixed property of every kind and character and wheresoever situate and to borrow money upon its own account and for the account of others and to lend money upon the security of all manner of choses in action, securities of every kind and character and property, real, personal or mixed.

“3. To invest the funds or the credit of the corporation in, or to advance or lend money upon the credit of any individual, corporation, association or partnership or upon the security of real or personal property or choses in action or securities of whatever kind and nature.

“4. To aid in any manner any corporation

(Testimony of Stephen F. Chadwick.)

or association, the bonds, securities or other evidence of indebtedness of which or the shares of stock in which are held by or for this corporation or in which or in the welfare of which this corporation shall have any interest, and to do any acts or things designed to protest, preserve, improve or enhance the value of any such bonds or securities or evidences of indebtedness or such shares of stock [36] or other properties of this corporation.

“5. To borrow or raise money for any of the purposes of the corporation, to issue bonds, debentures, notes or other obligations of any nature or in any manner for moneys so borrowed, and to secure the payment thereof and the interest thereon by mortgages upon or pledge or conveyance or assignment of the whole or any part of the earnings or property of the corporation, real, personal or mixed, including contract rights, whether at the time owned or thereafter to be acquired, and to sell and pledge such bonds, debentures or other obligations of the corporation for its corporate purposes.

“6. To guarantee the payment of dividends upon any shares of the capital stock of or the performance of any contract by any other corporation or association in which this corporation has an interest and to endorse for or otherwise guarantee the payment of the principal and interest or either of any bonds, debentures, notes, securities or other evidences of indebted-

(Testimony of Stephen F. Chadwick.)

ness created or issued by any other such corporation or association.

“7. To acquire the good will, rights and property and to underwrite the whole or any part of the assets of any person, firm, association or corporation and to pay for the same with stock of this corporation or upon such terms, whether for cash or credit as may be agreed upon; to hold or in any manner dispose of the whole or any part of the property so purchased; to conduct in any lawful manner the whole or any part of the business so acquired and to exercise all the powers necessary or convenient in or about the conduct and management of such business.

“8. To do, either as principal, agent, factor, contractor, or otherwise, and either alone or in connection with one or more firms, individuals, or other corporations, anything and everything necessary, suitable, convenient or proper for the accomplishment of any of the purposes or the attainment of any one or more of the objects herein enumerated, or incidental to the powers herein specified, or which shall at any time appear conducive to, or expedient for, the accomplishment of any of the purposes, or for the attainment of any of the objects hereinbefore enumerated, if not inconsistent with the laws of the state of Washington.

(Testimony of Stephen F. Chadwick.)

“ARTICLE V.

“The total authorized capital stock of this corporation shall be fifty thousand (50,000) shares, having a par value of One (\$1) Dollar each and being all of one class and with the same rights, voting powers, privileges and restrictions.

“ARTICLE VI.

“The amount of paid-in capital with which the corporation will begin business shall be the sum of Twenty-five Thousand (\$25,000) Dollars. [37]

“ARTICLE VII.

“The first board of directors who shall manage the concerns of this corporation and their postoffice addresses and terms of office are as follows:

EMIL G. SICK

814 Second Avenue

Seattle, Washington

6 months

S. F. CHADWICK

656 Central Building

O. H. MILLS

656 Central Building

Seattle, Washington

6 months

“BY-LAWS”

“ARTICLE V.

“Certificates of Stock

(Testimony of Stephen F. Chadwick.)

“Certificates of stock shall be separately numbered and shall be entered in the books of the corporation as they are issued. They shall exhibit the holders’ names and the number of shares, and shall be signed by the president or a vice-president and the secretary and/or assistant secretary.

“ARTICLE VII.

“Trustees’ and Stockholders’ Meetings

“At all meetings of the stockholders, each stockholder shall be entitled to one vote for each share of stock held by him.

“ARTICLE VIII.

“AMENDMENTS.

“These by-laws may be altered or amended by vote of a majority in amount of all of the stockholders at any annual meeting or at any special meeting of the stockholders called for that purpose.”

The minutes of the first meeting of the board of Trustees of Washmont Corporation held April 31, 1937, at which the by-laws of the company were adopted, were submitted in evidence and showed the following proceedings:

“Mr. Sick suggested that in satisfaction of his subscription to the 24,800 shares of the capital stock of the corporation and in satisfaction of the subscriptions of S. F. Chadwick and O. H. Mills,

(Testimony of Stephen F. Chadwick.)

each for 100 shares, he proposed to transfer to the corporation 1000 shares of the capital stock of Seattle Brewing & Malting Company. The trustees having considered said proposal and [38] being of the opinion that said shares of stock were reasonably worth the sum of \$25,000, said sum being the aggregate of the subscriptions mentioned, the following resolution was duly and unanimously passed:

‘Resolved that this corporation, in satisfaction of the subscriptions heretofore made by Emil G. Sick, S. F. Chadwick and O. H. Mills, aggregating a subscription to 25,000 shares of \$1 par value each of the capital stock of this corporation, accept the offer of Emil G. Sick to transfer 1000 shares of the capital stock of Seattle Brewing & Malting Company to this corporation, and that such transfer be and the same is hereby accepted, and that the said stock be issued as fully paid and the said subscription to capital stock satisfied.’

“The president stated to the meeting that the opportunity might be available to the company to acquire substantial blocks of stock in four operating breweries in the states of Washington and Montana; that as this opportunity might be presented to him while visiting in Calgary, Alberta, he invited the consideration of the board of the authorization of the issuance of participating dividend debentures to the amount of \$625,000, in denominations one of \$500,000 and five of \$25,000, to be used for the purpose of acquiring such stocks at their current, fair

(Testimony of Stephen F. Chadwick.)

market value, aggregating \$595,245 and the further acquiring of \$29,755 in cash.

“Mr. Chadwick then submitted to the meeting a form of participating dividend debenture which he had prepared, which was given careful consideration by the board and a copy of which is hereto attached and by reference made a part of the minutes of this meeting, and upon motion duly made and seconded, the following resolution was unanimously passed:

‘Resolved that the president of this corporation be and he hereby is authorized to negotiate for the purchase of capital stock of Seattle Brewing & Malting Company to the extent of 12,500 shares at the fair value of \$24.50 per share; 740 shares of Missoula Brewing Company at the fair value of \$188 per share; 54,460 shares of Great Falls Breweries, Inc., at the fair value of \$1.25 per share; and 409 shares of Goetz Breweries, Inc., at the fair value of \$200 per share; and for cash in the sum of \$29,755; and if said stocks and cash be found available, to deliver in payment therefor the participating dividend debentures of this company in the [39] aggregate total amount of \$625,000, in denominations of one for \$500,000, and five for \$25,000, and in form of the sample debenture, copy of which is attached to and made a part of the minutes of this meeting, the said debentures, if such sale be consummated by said date, to be dated April 30, 1937.’

(Testimony of Stephen F. Chadwick.)

“Mr. Chadwick reported that he had communicated with the Director of the Department of Licenses of Washington with reference to whether or not any permit might be required from that Department in connection with the issuance of the company’s debentures in the contemplated transaction covered by the foregoing resolution and advised that he was in receipt of a letter from the Director of the Department of Licenses of Washington stating that as there was no public offering, it would not be necessary to take the matter up with his office. The letter received by Mr. Chadwick was then filed with the Secretary to be attached to the minutes of this meeting.”

Cross-Examination of
Stephen F. Chadwick (Continued)

It was intended that the hazard as to the investment of Associated Breweries and Mr. Sick should be on an equal basis. Except for Mr. Sick’s substantial interests in both Associated and Washmont, Associated was to have no voice or vote in the corporate affairs of Washmont by reason of its ownership of debentures. In consideration of the issuance of these debentures, Associated Breweries put up stock and cash of \$625,000.00. It was provided that the debentures were a lien upon the property of Washmont Corporation, but the term meant only that the debentures were a lien upon themselves.

I understood that what was denominated “inter-

(Testimony of Stephen F. Chadwick.)

est", was only payable out of net profits if earned and that this was true also of the dividends. The tax return shows that both dividends and interest were paid upon the debentures. 3% of the face value of the debentures was denominated "interest", and dividends were to be paid out of whatever was left available from net earnings, [40] to the end that all net earnings should be distributed.

The debentures recited that they were payable in twenty years, but there was nothing out of which they could be paid except by retiring the capital of the corporation. There was no way to accumulate any surplus off the stock because whatever was earned every year was declared and paid out. It was not the same situation as the payment of a mortgage. The securities held had a readily realizable market value and were dealt in on the market.

Redirect Examination

Referring to the provision that the debentures should be a lien upon net earnings of the company, no mortgage of any kind was ever given to support the debentures, and no steps taken to fix a lien, beyond the reference in the debenture itself.

EMIL G. SICK

was thereupon called on behalf of the plaintiff herein, and having been first duly sworn, testified as follows:

(Testimony of Emil G. Sick.)

I am the president of Washmont Corporation and am also president and a stockholder of Associated Breweries, Ltd., of Canada. There are about 600 stockholders in Associated Breweries, and the same number existed in 1937 and 1938. There was an original preferred issue of Associated Breweries stock in the amount of \$1,500,000.00 now reduced to about \$750,000.00, and in addition \$240,000.00 in no par common stock. At no time during 1937 was 50% or more of the stock concentrated in the hands of five or less persons.

Associated Breweries owned outright the entire stock in five operating Breweries in Western Canada and had brewery investments in the form of stocks in the United States. It had been engaged in business thirteen years during which I have been connected with it, as well as members of my family. My father was the original president, I was the original manager and director. [41]

After the repeal of prohibition I came down here and established breweries in Great Falls, Missoula, Spokane and Seattle and invested in the Olympia Brewing Company and Seattle Brewing and Malting Company was formed in the summer of 1933.

I supervised the initiation of all these United States enterprises, and in that connection came to Seattle to live. In promoting these enterprises, I desired to have them controlled and owned locally. In 1937 Associated owned stocks in these companies totaling about a million dollars.

(Testimony of Emil G. Sick.)

The whole intended purpose of forming Washmont Corporation was to provide local control. It was arranged that Associated was to get the same comparative value for the shares which it turned over to Washmont Corporation, in these United States brewing companies, without any vote, so that control would be local. Associated turned in to Washmont Corporation enough shares of each of the companies concerned to make local control. In return for the shares which Associated turned in, it received back the so-called participating dividend debentures. It was my intention that the participating dividend debentures should stand behind the creditors of Washmont; that the debentures were stock at the risk of the business. I reported to the directors of Associated, that their investment was substantially the same in form as it had been, except that they had lost their vote. They approved this.

I had occasion to borrow some money from Peoples National Bank on behalf of Washmont in 1937, and communicated with Mr. Brygger by telephone in October of that year. In referring to the debentures on the statement, I told him that the stock was really free and that I could leave any amount with him as security. By that I mean that the whole investment portfolio was free, and that I could hypothecate the stocks and that there was no lien against them. These stocks in the investment portfolio contained the whole [42] value of the company; they were free for me to do with as

(Testimony of Emil G. Sick.)

management dictated. The debentures had no lien upon them actually except to share the same as my common stock, as was definitely agreed upon. My common stock and the debentures were exactly on the same basis per dollar, except that they didn't vote and I did. The whole purpose was to make local control. We called them "debentures" because they had no vote.

Cross-Examination

I own less than 10% of the stock of Associated Breweries, and my family controls less than 33%. The purpose in forming Washmont Corporation was to get local control of these United States breweries, particularly Seattle Brewing and Malting. When local control was obtained it was not actually obtained by myself. I retained control of these other breweries, only by adding my Washmont stock to other American shares. A big block of stock in these American companies was owned locally and voting control was provided by adding it to the further block. I do not have control of Seattle Brewing and Malting either through Washmont Corporation or the ownership of other additional stocks. I own about one-third of the stock in Washmont Corporation and Seattle Brewing and Malting Company. I am president of the latter and of the other breweries, and have been the active managing head since the repeal of prohibition. The outstanding stock of Seattle Brewing and Malting is a million and a half shares and there is no other voting stock in that corporation.

(Testimony of Emil G. Sick.)

In determining the value of the stock of Washmont Corporation issued to me, Associated Breweries and I traded in our stock for other securities, at book value, plus 20%. I turned in 1000 of the old shares of capital stock of Seattle Brewing and Malting Company, which were then selling at around \$20.00. In return, I took book value plus 20%, or a fifth, in shares of Washmont [43] Corporation, Associated Breweries also took book value plus a fifth. Associated Breweries in all cases turned in enough shares to make local control. The book value of that stock turned in, plus 20%, made \$625,000.00.

The common stock and debentures were supposed to be exactly on the same basis, except that the common stock did all the voting. Although it is provided in the debentures that they shall draw interest at 3% before any dividend on the common stock, this results in equality because the rate is made so low that the common stock also draws 3%. Unless earnings were sufficient to pay 3% to both the debenture holders and the stockholders, nobody would get anything. I was very explicit with Mr. Ker on that point in setting the corporation up. The intention was to make the stock and debentures exactly even, and it was provided that interest should first be paid on the debentures, in order to justify giving all the voting power to the common stock. The interest rate was made so low that it was inconceivable to us that the common would not share in it too. It is my view, that reading the

(Testimony of Emil G. Sick.)

terms of the debentures, those debentures could not be paying 3% without the common getting 3%. I don't think the provision provides for priorities for the debentures. It is my conception that the common stock is entitled to dividends at exactly the same rate as the debentures. I got the idea to some extent from the set-up of the Olympia Brewing Company, where the common and preferred share equally, and those shares sell for exactly the same on the market, because it is commonly understood that preferred and common are on the same basis. We wanted to make a distinction in the holding, since we could not make it all common and still let some common stock vote and have some not voting. The intention was that they be exactly on the same basis, except that only one kind of stock would do the voting.

The common stock does not provide for a lien upon the [44] corporation's assets. The provisions of the debentures do provide for a lien. But as a common stock investor, I say that I get the same stakes in the wind-up. It is my understanding that the words "lien" and "debentures" have no effect, in this case.

The whole consideration in the consultation with my attorney in drawing up the debentures, was given to making the common stock and the other stock debentures, even. No consideration was given the matter of security; Associated Breweries was not attempting to convert its shares into a better security. That was not the purpose of the transac-

(Testimony of Emil G. Sick.)

tion. At my insistence, Associated Breweries was merely wanting to lose its voting power, so that we would have local control. There was no idea of giving Associated better security in their investment; that didn't enter into it a bit. The whole idea was to crowd the voting power into a few shares, and without my losing anything on my few shares. Mr. Ker was very insistent on that. There was no intent or purpose to give Associated Breweries greater security. The purpose in including a reference to a lien was merely to make some distinction between the two stocks in words, so as to give one the voting power and not the other. It was a distinction only in words. My idea always was that the debentures were actually, to all purposes, preferred stock, and only preferred stock.

The reason for not making these debentures "preferred stock" was that we were advised that the Washington and Montana state laws prohibited aliens from owning land, so that control of the corporations had to be in the hands of citizens, since Washmont Corporation owned stocks in companies, which in turn owned land. We were advised of the Montana law by the Attorney-General in 1933.

Redirect Examination

At the time of issuance of debentures, the general manager of Associated Breweries said that in compliance with the law [45] something other than preferred stock might be required, and the use of the term "debentures" arose out of a discussion between us all.

EDWARD HOOVER

was thereupon called on behalf of the plaintiff herein, and having been first duly sworn, testified as follows:

I am a public accountant and am the manager of the Seattle branch of Price Waterhouse Inc. I have done business with the Washmont Corporation from its inception up to the present time. Representatives of our firm prepared the tax returns for it for 1937 and 1938.

The income tax return of plaintiff Washmont Corporation for the year 1937 was then received in evidence as plaintiff's Exhibit 4. The pertinent portions of said Exhibit 4 are as follows:

Under Schedule A deductions, Item 20 shows interest payment of \$12,698.04.

Under Schedule B, Item 1 shows Total Distribution to stockholders charged to earned surplus during the taxable year—\$39,750.00.

Under Schedule M Item 1 shows Cash distribution to stockholders out of earnings or profits of the taxable year of \$39,750.00.

The income tax return of plaintiff Washmont Corporation for the year 1938 was then received in evidence as plaintiff's Exhibit 5, and the pertinent parts thereof are as follows:

Under Gross Income, Item 20 shows a deduction for interest paid of \$19,165.21.

Schedule A, under the heading "Reconciliation," shows a distribution to shareholders of \$13,750.00.

The witness then continued:

(Testimony of Edward Hoover.)

The figure shown on line 20 Exhibit 4 designated "interest" amounting to \$12,698.04 represents interest on the so-called [46] debentures to the extent of \$12,500.00.

In the same Exhibit under Schedule B Item 1 designated 'total distribution to shareholders during taxable year' is \$39,750.00 of which amount \$37,500.00 represents payment on the participating dividend debentures.

In Exhibit 5 Item 20 shows the amount of \$19,165.21 as an interest deduction of which amount \$18,750.00 represents a distribution on the debentures, being 3% on \$625,000.00 for one (1) year.

In the same Exhibit, Item 1 of Schedule A shows a total distribution to stockholders charged to earned surplus during the taxable year of \$13,750.00.

Cross-Examination

The item of \$13,750.00 above mentioned shown on Exhibit 5 represents a dividend of \$1,250.00, and payment on participating debentures of \$12,500.00.

Redirect Examination

A deduction was taken for interest on plaintiff's income tax return of \$12,500.00 for 1937, and for 1938, \$12,750.00.

The minute book of Washmont Corporation having been identified as plaintiff's Exhibit 3, Counsel for the respective parties thereupon offered certain portions of such record, which so far as pertinent to this appeal and the ruling thereon, are as follows:

There was offered by defendant and admitted, affidavit of S. F. Chadwick and O. H. Mills dated April 21, 1937, certifying that the amount of paid in capital, to-wit \$25,000, with which Washmont Corportion is authorized to commence business has been fully paid.

There was offered by defendant and admitted, copy of stock certificate of Washmont Corporation, as follows: [47]

“Incorporated Under The Laws Of
The State of Washington
No..... Shares.....

WASHMONT CORPORATION

Capital Stock \$50,000.00

This certifies that.....
is the owner of.....Shares of the Capital Stock of Washmont Corporation [Corporate Seal, 1937, Washington], transferable only on the books of the Corporation by the holder hereof in person or by Attorney upon surrender of this Certificate properly endorsed.

In witness whereof, the said Corporation has caused this Certificate to be signed by its duly authorized officers and to be sealed with the Seal of the Corporation this.....day of, A. D. 19.....
Shares \$1.00 each.”

There were offered by the defendant and ad-

mitted, copies of participating dividend debentures of Washmont Corporation, consisting of Debenture No. 1 for \$500,000, and Debentures No. 2 to 6 inclusive for \$25,000 each, which are identical except for amounts. Certificate No. 1 bears a cancelled Internal Revenue stamp of \$500, and each of the other certificates bears cancelled Internal Revenue stamps of \$25. A copy of said Debenture No. 1 is as follows:

“PARTICIPATING DIVIDEND
DEBENTURE

\$500,000.00

—of—

No. 1

WASHMONT CORPORATION

The Washmont Corporation, a Washington corporation, hereinafter called the “Company,” which term shall include any successor corporation, for value received, hereby acknowledges itself indebted and promises to pay to the registered owner hereof, on or before twenty years from the date hereof, or on a date to be fixed as hereinafter provided and for the retirement of this debenture, the sum of [48]—Five Hundred Thousand (\$500,000.00) Dollars—or such other sum as shall be required for retirement in accordance with the terms hereof; and until the principal moneys and all interest and dividends due hereon shall have been fully paid, if the same be earned, to pay

interest thereon at the rate of three (3%) per cent per annum by equal semi-annual payments on the first day of May and the first day of November in each year.

“This debenture constitutes a lien upon the property and net earnings of the company and the company hereby charges with the payment of its undertaking herein all of its property whatsoever and wheresoever, both present and future.

“The interest due hereon is only payable out of the net earnings of the company for each fiscal year and shall be paid before any dividend shall be set apart and paid to the holders of common stock of the company for such year. The common stock of the company shall, in any year in which interest as herein provided shall have been paid on all debentures of this issue outstanding, be entitled to receive dividends equal to 3% upon the par value of such common stock, after which all funds constituting available net earnings shall be divided ratably in accordance with the face value of outstanding debentures of this issue and par value of outstanding common stock and such fund shall then be distributed ratably as dividends upon the common stock and as participating dividends to the registered owners of debentures of this issue.

“Both principal and interest and participating dividends upon this debenture are payable

to the registered owner at the office of the company in Seattle, Washington, in lawful money of the United States, such payments being subject to deduction for any Federal income tax or other taxes due thereon because of or by reason of any present or future laws of the United States of America or state of Washington.

“This debenture is one of a series designated as 3% participating dividend debentures of an authorized issue aggregating \$625,000 and issued in denominations one of \$500,000 and five of \$25,000 each.

“The debentures of this issue are payable and subject to redemption at the office of the company in the city of Seattle, Washington, twenty years from date or on any interest payment date, or dates, after the company shall have given one month’s notice of the intention to pay and redeem the same, by mailing such notice to the record address of the registered holders thereof, by payment of the principal amount thereof, interest, if earned and unpaid, and all unpaid accrued and declared participating dividends due thereon, plus a premium equal to the excess of book value of the then assets of the corporation over the par value of its outstanding common stock and face value of debentures of this issue then outstanding, ratably apportioned to such common stock and to such debentures.

“Upon liquidation of the company prior to payment of the debentures of this issue, the holders thereof shall be entitled to participate in surplus of assets in the same ratable proportion as is provided for their participation in the event of call and redemption. [49]

“This debenture is registered as to principal and interest and participating dividends by registration on the books of the company kept for that purpose in the city of Seattle, Washington, which fact of registration is noted hereon. No transfer shall be valid unless made on said books by the registered owner in person or by duly authorized attorney of such owner and formally noted on the debenture.

“In witness whereof, Washmont Corporation has caused this debenture to be signed in its name by its president or its vice-president and its corporate seal to be hereunto affixed and to be attested by its secretary or assistant secretary, this 30th day of April, 1937.

WASHMONT CORPORATION

By

President”

“Attest:

Secretary”

“REGISTRATION

Notice to the holder: Do not write on this space. This debenture must be registered and

the registration noted hereon by the Secretary or Assistant Secretary of the corporation.

Date of Registry

In Whose Name Registered.....

Signature of Registering Officer.....

\$500 Documenary Stamp D 44211 D.

Checked 5-17-37.

CLARENCE S. HAGGEN,

Dep. Coll. of Internal Revenue.”

There was offered by the plaintiff and admitted in evidence [50] copy of Record of Registration of Participating Dividend Debentures as follows:

“RECORD OF REGISTRATION

—of—

PARTICIPATING DIVIDEND DEBENTURES

Participating dividend debentures Nos. one to six inclusive, authorized as at the meeting of April 21, 1937, being one participating dividend debenture in the amount of Five Hundred Thousand (\$500,000) Dollars, and five participating dividend debentures each in the amount of Twenty-five Thousand (\$25,000) Dollars, were on this 30th day of April, 1937, registered in the name of Associated Breweries of Canada, Limited, by the undersigned as secretary of Washmont Corporation, and the

fact of such registration was endorsed on each of said several participating dividend debentures.

O. H. MILLS,
Secretary.”

There was offered by plaintiff and admitted, minutes of special meeting of directors of Washmont Corporation held December 10, 1937, containing the following:

“

“Mr. Sick announced that the purpose of the meeting was to declare a dividend to the stockholders of the Company and to the owners of the Participating debentures of the Company. After discussing a summary prepared by the Company's auditors relative to earnings and expected earnings of the Company for the year, the following Resolutions were unanimously adopted:

“Be it resolved, that whereas, interest at the rate of 3% per annum has been duly paid on the Participating Dividend Debentures of this Company as of November 1, 1937, and accordingly a dividend in the amount of 3% upon the par value of the common stock of the Company may be now declared;

“Now, therefore, be it resolved, that a dividend at the rate of 3% upon the common stock of the Company be paid to stockholders of rec-

ord on December 15, 1937, and distributed on December 20, 1937, and

“Be it further resolved, that there will then remain in the Treasury of the Company a sum in excess of \$39,000.00 constituting available net earnings from which dividends may be declared; now, therefore, be it resolved, that said sum so available as net earnings be divided ratably in accordance with the face value of the outstanding debentures of this Company and the par value of the outstanding common stock thereof, the same constituting a 6% [51] dividend upon the par value of such common stock and the face value of such outstanding debentures, and that such distribution be made to such stockholders and debenture holders of record December 15, 1937, and distributed December 20, 1937.”

There was offered by the defendant and admitted, minutes of annual meeting of the stockholders of Washmont Corporation held April 15, 1938, containing the following:

“The President called the meeting to order and directed the Secretary to poll the stock present at the meeting. There were present, in addition to the Chairman, Mr. Stephen F. Chadwick and Mr. R. H. B. Ker, representing 25,000 shares of the capital stock.

“The President announced the presence of a quorum, and presented to the meeting a

resume of the Company's business and affairs during the preceding year."

There was offered by the plaintiff and admitted, minutes of special meeting of the Board of Directors held December 29, 1938, containing the following:

"Mr. Sick announced that the purpose of the meeting was to declare a dividend to the stockholders of the Company and to the owners of the Participating debentures of the Company. After discussing a summary prepared by the Secretary relative to earnings and expected earnings of the Company for the year, the following Resolutions were unanimously adopted:

" 'Be it resolved, that whereas, interest at the rate of 3% per annum has been duly paid on the Participating Dividend Debentures of this Company for the year 1938, and accordingly a dividend in the amount of 3% upon the par value of the common stock of the Company may be now declared;

" 'Now, Therefore, Be It Resolved, that a dividend at the rate of 3% upon the common stock of the Company be paid to stockholders of record on December 29, 1938, and distributed on December 29, 1938, and

" 'Be It Further Resolved, that there will then remian in the Treasury of the Company a sum in excess of \$15,000.00 constituting available net earnings from which dividends may be declared; Now, Therefore, Be It Resolved, that

said sum so available as net earnings be divided ratably in accordance with the face value of the outstanding debentures of this Company and the par value of the outstanding common stock thereof, the same constituting a 2% dividend upon the par value of such common stock and the face value of such outstanding debentures, and that such distribution be made to such stockholders and debenture holders of record December 29, 1938, and distributed December 29, 1938.' "

The plaintiff then offered, and upon objection the Court refused to receive certain minutes and records of Washmont [52] Corporation, which, so far as material to this appeal, consist of the following:

Minutes of Special meeting of common stockholders of Washmont Corporation held April 11, 1940.

The chair stated that the purpose of the meeting was to consider a proposal to change the capital stock of the corporation by the authorizing of the issuance of preferred shares to be delivered to the owners and holders of the participating dividend debentures heretofore issued by the corporation; that while the company took the position with the Internal Revenue Department of the Department of Treasury of the United States that the holders of participating dividend debentures of the company were in fact stockholders, whose investments were equally at hazard in the success of the corporation

with the capital evidenced by the company's certificates of common stock, that since the program of participating dividend debentures was somewhat unprecedented, it was felt that the true situation would be more evident if in lieu of participating dividend debentures preferred stock certificates were issued.

Resolution was adopted to change Article 5 of the Articles of Incorporation so as to provide that instead of an authorized capital of 50,000 shares of the par value of \$1.00 each, all of one class, with the same rights, voting powers, privileges and restrictions. The capital stock shall consist of \$1,050,000 divided into common and preferred stock of which the common shall consist of 50,000 shares of the par value of \$1.00 each, and the preferred of 1,000 shares of the par value of \$1,000 each. The preferred stock to be entitled to receive, if earned, dividends at the rate of 3% prior to payment of dividends on common stock, and the common stock to receive, after payment of such dividends on preferred, a dividend at the rate of 3% after which all remaining available [53] earnings shall be distributed ratably in proportion to the par value in the outstanding preferred and common stock. Such preferred stock shall be redeemable in whole or in part at the option of the Board of Directors upon one month's notice, at the par value thereof plus unpaid dividends due thereon, plus a premium equal to the excess of book value of the then assets of the corporation over the par value of its outstanding common stock, and the outstanding pre-

ferred stock then issued and outstanding ratably apportioned between them; with similar provision for payment upon liquidation. The preferred stock shall have no voting power except on matters reserved to it by statute, nor be entitled to notice of meetings of stockholders.

“Associated Breweries of Canada, Ltd., hereby enters its subscription for six hundred fifty-four (654) shares of the preferred capital stock of Washmont Corporation and tenders in satisfaction of said subscription Participating Dividend Debentures of said Washmont Corporation in the sum of \$625,000 principal in Debentures number 1-6 inclusive, and Participating Stock Dividend Debenture, Series Two, No. 1, for \$28,980 principal, and directs that the sum of \$20 required to bring its subscription up to \$654,000 be charged to participating dividend due and accrued upon said debentures to this date, it being understood that the first dividend to be paid upon said Preferred Stock so subscribed for, to-wit, the dividend to be paid May 1, 1940, will be paid in full without deduction of certificates of preferred stock for said Participating Dividend Debentures and said Participating Stock Dividend Debenture.

Dated this 12th day of April, 1940.

ASSOCIATED BREWERIES OF

CANADA, LTD.

E. G. SICK,

President.”

Amendatory Articles of Incorporation filed with the office of the Secretary of State of Washington, April 12, 1940, increasing the capital stock of Washmont Corporation from \$50,000 to \$1,050,000, and changing Article 5 in accordance with Resolution adopted by the stockholders as above set forth. [54]

Thereupon both parties rested.

The foregoing is all of the material evidence adduced at the hearing before the Court, and material to the statement of points upon which appellant intends to rely herein.

(Signed) H. B. JONES

Attorney for Plaintiff and
Appellant.

Copy received this 5th day of Aug., 1942.

THOMAS R. WINTER

[Endorsed]: Filed Aug. 11, 1942.

[55]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CON-
TENTS OF RECORD ON APPEAL

The plaintiff above named having taken an appeal from the judgment herein designates the following to be included in the record on appeal:

1. Complaint
2. Amended Answer
3. Opinion

4. Findings and Conclusions
5. Judgment
6. Notice of Appeal
7. Statement of points on appeal
8. Condensed statement of testimony filed herein
9. This designation
10. Order extending time.

(Signed) H. B. JONES

Attorneys for Appellant

Copy received this 6th day of Aug., 1942.

THOMAS R. WINTER

[Endorsed]: Filed Aug. 11, 1942.

[56]

[Title of District Court and Cause.]

ORDER EXTENDING TIME

It is hereby stipulated by and between the plaintiff-appellant, by its attorneys, Jones & Bronson, and defendant-appellee, by Thomas R. Winter, Special Assistant to the Chief Counsel for the Bureau of Internal Revenue, that the time for filing the record on appeal and the docketing of the action shall be extended to a date ninety days from the date of first notice of appeal, which date was May 25, 1942, and that an order may be entered granting such extension.

JONES AND BRONSON

H. B. JONES

Attorneys for Plaintiff-
Appellant

THOMAS R. WINTER

General Counsel Representative,
Bureau of Internal
Revenue of Counsel for Defendant-Appellee

Approved and so ordered this 29th day of June,
1942.

JOHN C. BOWEN,

United States District Judge

[Endorsed]: Filed June 29, 1942.

[57]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

I, Judson W. Shorett, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify and return that the foregoing Transcript of the Record on Appeal, consisting of pages numbered 1 to 57, inclusive, is a full, true and correct copy of so much of the record, papers, and proceedings in Cause No. 216, Washmont Corporation, a corporation, Plaintiff and Appellant, vs. Thor W. Henricksen, individually and as Acting Collector of Internal Revenue, etc., Defendant and Appellee, as required by the Designation of the Plaintiff-Appellant of the Contents of the record on Appeal, on file and of record in my office at Tacoma, Washington, the same

constituting the Transcript of the Record on Appeal from the Judgment of the District Court of the United States for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the original Statement of Appellant of Points and Designation of Record for Printing is transmitted herewith.

I do further certify that the following, is a full, true and correct statement of all expenses, fees and charges incurred and paid on behalf of the Plaintiff-Appellant herein, in the preparation and certification of this Transcript of the Record on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Appeal fee	\$ 5.00
Clerk's fees for preparing and comparing the aforesaid record	7.50
Clerk's certificate50
	<hr/>
	\$13.00

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, at the City of Tacoma, State of Washington, this 20th day of August, 1942.

[Seal]

JUDSON W. SHORETT,

Clerk

By E. REDMAYNE,

Deputy

[Endorsed]: No. 10228. United States Circuit Court of Appeals for the Ninth Circuit. Washmont Corporation, a Corporation, Appellant, vs. Thor W. Henricksen, Individually, and as Acting Collector for Internal Revenue for the Western District of Washington, Southern Division, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed August 24, 1942.

PAUL P. O'BRIEN

Clerk of the United States
Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit
No. 10228

WASHMONT CORPORATION,
a corporation,

Appellant

v.

THOR W. HENRICKSEN, individually and as
Acting Collector of Internal Revenue for the
Western District of Washington, Southern Division,
Appellee

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF RECORD FOR
PRINTING

Comes now Washmont Corporation, appellant above named, and for its statement of points upon which it intends to rely on this appeal adopts the statement of points filed by it in the District Court in connection with its notice of appeal and included in the transcript of record prepared and certified by the Clerk of such District Court at page 28 thereof; and appellant designates the entire transcript of record as prepared and certified by the Clerk of said court as necessary for the consideration of this appeal.

H. B. JONES

Attorney for Appellant

Copy received this 18th day of Aug., 1942.

THOMAS R. WINTER

[Endorsed]: Filed Aug. 24, 1942.